

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

Missouri Landowners Alliance, and	)	
Eastern Missouri Landowners Alliance	)	
d/b/a Show Me Concerned Landowners,	)	
and John G. Hobbs	)	
	)	
Complainants,	)	Case No. EC-2021-0059
	)	
V.	)	
	)	
Grain Belt Express LLC and	)	
Invenergy Transmission LLC,	)	
	)	
Respondents	)	

**MOTION TO DISMISS COMPLAINT, OR, IN THE ALTERNATIVE, MOTION TO  
WAIVE FILING OF REBUTTAL TESTIMONY, CANCEL EVIDENTIARY HEARING,  
AND PROCEED TO BRIEFING; AND MOTION FOR EXPEDITED TREATMENT**

Invenergy Transmission LLC (“Invenergy Transmission”) and Grain Belt Express LLC (“Grain Belt” and together with Invenergy Transmission, the “Respondents”) hereby file this Motion to Dismiss the Complaint, or, in the alternative, to waive the filing of Respondents’ rebuttal testimony, cancel the evidentiary hearing currently scheduled for April 1, 2021, and proceed directly to briefing. Respondents are also requesting expedited treatment of this Motion. In support of this Motion, Respondents state as follows:

**I. BACKGROUND SUMMARY**

1. For the sake of brevity, Respondents will not restate the full procedural history here, and instead provide a summary of pertinent filings.
  
2. On September 2, 2020, Complainants filed a formal complaint against Respondents at the Missouri Public Service Commission (“Commission”), alleging that Respondents’ contemplated changes to the Grain Belt Express Project (the “Project”), as

reflected in their August 25, 2020 press release and as briefly described on their website, invalidated the Certificate of Convenience and Necessity (“CCN”) granted to Respondent Grain Belt in Case No. EA-2016-0358 (the “CCN case”).

3. On September 3, 2020, the Commission issued a Notice of Formal Complaint and Order Directing Staff to File a Preliminary Report (“Notice Order”). The Notice Order directed Respondents to file a Response to the Complaint by October 3, 2020, and directed Commission Staff (“Staff”) to file its Preliminary Report on or before October 18, 2020.

4. On September 29, 2020, Staff, Complainants and Respondents filed a Joint Motion to Suspend Deadlines and Establish a Briefing Schedule. The Joint Motion requested that the Commission: (1) suspend the October 3, 2020 date for Respondents to file an Answer or Response to the Complaint; (2) suspend the October 18, 2020 date for Staff to file its Preliminary Report on the Complaint; (3) issue an Order adopting the proposed briefing schedule discussed therein, and for any such further relief as the Commission may deem just and appropriate.

5. The Joint Motion was granted, and pursuant to the Commission’s October 5, 2020 Order, Complainants, Respondents and Staff filed simultaneous initial briefs on October 23, 2020, and simultaneous reply briefs on October 30, 2020. On December 16, 2020, the Commission issued its Order Directing Additional Briefing to respond to three specific Commission questions.

6. On December 23, 2020, the Commission issued its Order Canceling Briefing Schedule and Directing Filing. Subsequently, on February 24, 2021, the Commission issued an Order Modifying the Procedural Schedule and Denying Motion to Suspend Procedural Schedule.

7. The procedural schedule ordered by the Commission is as follows:

<b>Event</b>	<b>Date</b>
Complainants’ Direct Testimony	March 11, 2021

Respondents Rebuttal Testimony & Staff's Rebuttal Testimony/Report	March 24, 2021
Joint list of issues, order of witnesses, order of cross-examination, order of opening	March 25, 2021
Last Day to Request Discovery	March 26, 2021
Position Statements	March 29, 2021
Evidentiary Hearing	April 1, 2021
All Parties' Post-Hearing Briefs	April 16, 2021

## II. MOTION TO DISMISS

8. On March 10, 2021, Complainants filed seven exhibits as the public portion of their direct case, and three additional exhibits as the confidential portion of their direct case, but submitted no direct testimony, as that term is commonly understood.<sup>1</sup>

9. 20 CSR 4240-2.130(7)(A) defines “direct testimony” as “all testimony and exhibits asserting and explaining that party’s entire case-in-chief.” 20 CSR 4240-2.130(7)(C) provides that “where only the moving party files direct testimony, rebuttal testimony shall include all testimony which explains why a party rejects, disagree or proposes an alternative to the moving party’s direct case.”

10. Complainants’ case-in-chief is comprised solely of copies of certain of Respondents’ data request responses, including preliminary drafts of Respondents’ August 25, 2020 press release and several pieces of Respondents’ e-mail correspondence, as well as a landowner door-hanger prepared by Respondents. Complainants have provided no witness testimony, have offered no context for these exhibits and have provided no argument or analysis

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<sup>1</sup> This situation is similar to a previous complaint involving the same parties, Case No. EC-2020-0408, in which counsel for Complainants withdrew the complaint two days prior to the evidentiary hearing scheduled for January 14, 2021. In support of his motion to withdraw the complaint, counsel for MLA cited the fact that one of his witnesses would no longer be participating and, and therefore he had no sponsor for several of his exhibits or the arguments in the complaint upon which the witness’ participation was dependent. *See*, Motion to Withdraw Complaint, EC-2020-0408, January 12, 2021.

“explaining that party’s entire case-in-chief,” in contravention of the Commission’s rules. Moreover, because Respondents do not, and cannot, “reject, disagree, or propose an alternative” to their own discovery responses, press release and e-mail, there can be no rebuttal testimony for Respondents to actually file.

11. Further, in the Commission’s January 20, 2021 Order Establishing Procedural Schedule, Other Procedural Requirements, the Commission issued the following directives, set forth in relevant part as follows:

“The parties shall comply with the following additional procedural requirements:

A. **Although not all parties may agree upon how each issue should be described or on whether a listed issue is in fact a proper issue in this case, the parties shall agree upon and file a list of the issues to be heard, the witnesses to appear on each day of the hearing, the order in which they will be called, and the order of cross-examination for each witness. The list of issues should be detailed enough to inform the Commission of each issue that must be resolved.** The Commission will view any issue not contained in this list of issues as uncontested and not requiring resolution by the Commission.

B. Each party shall file a simple and concise statement summarizing its position on each disputed issue. Position statements shall track the list of issues. Any position statement shall set forth any order requested, cite any law authorizing that relief, and allege facts relevant under the law **with citations to any pre-filed testimony in support.**

C. **All parties shall provide copies of testimony, schedules, exhibits, and pleadings to other counsel of record by electronic means and in electronic form essentially concurrently with the filing of such testimony, schedules, exhibits, or pleadings** where the information is available in electronic format. Parties shall not be required to put information that does not exist in electronic format into electronic format for purposes of exchanging it.

E. **Testimony shall be pre-filed as defined in Commission Rule 20 CSR 4240-2.130. All parties must comply with this rule, including the requirement that testimony be filed on line-numbered pages.” (emphasis supplied.)**

12. 20 CSR 4240-2.070(7) provides that, “The commission, on its own motion or the motion of any party, may after notice dismiss a complaint for failure to state a claim on which relief may be granted or failure to comply with any provision of these rules or an order of the commission.”

13. The Commission’s January 20, 2021 Order contained specific requirements for the filing of testimony and indicated all parties must comply with the Commission’s rules pertaining to pre-filed testimony. Complainants have failed to do so. The Commission’s February 24, 2021 Order directed Complainants to file Direct Testimony. Again, Complainants have failed to do so.

14. Accordingly, Respondents respectfully request that the Commission dismiss this Complaint due to Complainants’ failure to comply with the Commission’s orders and rules.

**III. MOTION TO WAIVE FILING OF REBUTTAL TESTIMONY, CANCEL EVIDENTIARY HEARING, AND PROCEED TO BRIEFING**

15. Alternatively, given the impossibility of filing “rebuttal testimony” in the face of the complete absence of direct testimony, Respondents respectfully request that the Commission waive the filing of rebuttal testimony, cancel the evidentiary hearing and proceed directly to briefing.

16. Given Complainants’ lack of a case-in-chief, Respondents are frankly baffled as to how the remainder of the procedural schedule will be executed. Respondents are likewise mystified as to how the evidentiary hearing can proceed, and how the parties will file lists of disputed issues and position statements with citations to pre-filed testimony where no pre-filed testimony exists. Similarly, if there is no direct testimony, there can be no rebuttal testimony, and if there are no witnesses, there is no need to file an order of witnesses and order of cross-examination.

17. Respondents submit that, procedurally, this Complaint appears to be ensnared in a circuitous Lewis-Carrollian rabbit hole. The Commission will recall that earlier in this proceeding, on September 29, 2020, Complainants, Respondents, and Staff filed a Joint Motion to Suspend Deadlines and Establish a Briefing Schedule. In that pleading, the joint movants stated that the parties agreed that “the Complaint is limited to a legal question that can be resolved without Staff undertaking an investigation into the Complainants’ allegations and that would be more appropriately addressed through briefs.”<sup>2</sup>

18. As previously noted, Complainants, Respondents and Staff filed simultaneous initial briefs on October 23, 2020, and simultaneous reply briefs on October 30, 2020.

19. On December 16, 2020, the Commission issued its Order Directing Additional Briefing, requiring the parties to respond to three specific Commission questions. It then became apparent that the parties were gridlocked regarding the scope of issues and discovery. Therefore, on December 23, 2020, the Commission issued an Order canceling the briefing schedule and directing the parties to file a procedural schedule, noting that “based upon all pleadings filed in this case, the Commission finds it unlikely that the current procedural proposals will lead to a disposition of this case on briefs without an evidentiary hearing.”<sup>3</sup> The Commission also noted that, “The evidentiary hearing is the opportunity for the parties to be heard and present evidence related to the allegations of the complaint. A list of issues submitted by the parties focuses the scope of the hearing. A stipulation of facts can limit evidence presented at the hearing.”<sup>4</sup>

20. Notwithstanding the fact that Complainants have issued four sets of data requests and two sets of requests for admissions to Respondents, presumably in pursuit of evidence to

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<sup>2</sup> Joint Motion to Suspend Current Deadlines and Establish a Briefing Schedule, ¶ 3.

<sup>3</sup> Order Cancelling Briefing Schedule and Directing Filing at p. 2.

<sup>4</sup> January 6, 2021 Order Regarding Motion for Clarification and Suspension of Requirement to File Procedural Schedule at p. 4.

present at the evidentiary hearing, Complainants have not provided any explanation regarding how the evidence supports their sole claim that the August 25, 2020 Press Release and website posting result in a violation of the CCN. Accordingly, there is no substance for the Respondents to counter, and there are no issues to focus the scope of the hearing.

21. At the very least, the case must proceed directly to briefing, as there is nothing for Respondents to reject, disagree with or propose an alternative to. 20 CSR 4240-2.130(7)(C). The Commission has already established the issues for briefing in its Order Granting in Part and Denying in Part Motion to Compel. Specifically, the Commission explained the subject matter of the Complaint as follows:

The first issue the Commission will have to resolve in this complaint is whether Respondents' website and press release demonstrate the Project's design and engineering is materially different from what was approved in the CCN Order. If the Commission finds that the changes announced in the website and press release are materially different, the second issue the Commission must determine is whether that public announcement of those changes violated the Commission's order granting the CCN. The second issue fundamentally asks when Respondents must file an updated application with the Commission for further review. Therefore, the matter of this complaint is whether Respondents website and press release announcing changes that the Commission did not authorize violated the Commission's order granting Respondents a CCN.

Order Granting in part and Denying in Part Motion to Compel, p. 3.

If the Commission does not dismiss the complaint, it should order the parties to proceed directly to briefing these identified issues.

#### **IV. REQUEST FOR EXPEDITED TREATMENT**

22. Given that rebuttal testimony is scheduled to be filed on March 24, 2021, Respondents respectfully request that the Commission rule on this Motion as expeditiously as possible and no later than March 24, 2021 to avoid subjecting Respondents and Staff to the

bewildering task of determining what to file in rebuttal. This Motion was filed as soon as practicable after Complainants' filing on March 10, 2021.

WHEREFORE, Respondents respectfully request that the Commission grant this Motion to Dismiss the complaint, or, in the alternative, to waive filing of rebuttal testimony, cancel the evidentiary hearing, and proceed directly to briefing, and for any such further relief as the Commission may deem just and appropriate.

Respectfully submitted,

*/s/ Anne E. Callenbach*

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ATTORNEYS FOR RESPONDENTS



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all parties of record by email or U.S. mail, postage prepaid, this 12th day of March, 2021.

/s/ Andrew O. Schulte  
Attorney for Respondents